Supreme Court, U.S.
FILED

991203 NOV 15 1999

OFFICE OF THE CLERK
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dennis Theriot; Ann Rodriguez; Ronald Perrin; Norman A. Ronquille; David J. Dowell; Iris C. Isenmann; Herman J. Carbo; Maplewood Civic Association, Inc.
Petitioners,

v.

Parish of Jefferson, State of Louisiana; T. J. Ward, also known as Butch; Donald Jones; et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Haywood H. Hillyer III, La. Bar No. 6925
Attorney-at-Law
P.O. Box 15521
New Orleans, Louisiana 70175-5521
Telephone: (504) 899-0890
Facsimile: (504) 899-4851
Counsel of Record

Of Counsel:
Dominic N. Varrecchio, La. Bar No. 19456
1449 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 524-8600

42 pp

QUESTIONS PRESENTED

1. Is the last districting scheme actually used by a political subdivision to hold elections within that jurisdiction the proper benchmark by which to measure Section 5 retrogression pursuant to the Voting Rights Act?

2. Did race predominate in the drawing of the boundaries of District 3 where the parish (political subdivision) intentionally drew the district to include an enhanced and non-compact black majority only after the Department of Justice made race-based demands that they do so?

3. Would the majority-minority district in question survive an analysis under the standard of strict scrutiny if the lower courts had properly found that race was the predominant consideration in the drawing of that district?

PARTIES TO THE PROCEEDING

Petitioners

Dennis Theriot, Ann Rodriguez, Ronald Perrin, Norman A. Ronquille, David J. Dowell, Iris C. Isenmann, Herman J. Carbo, and Maplewood Civic Association, Inc., a Louisiana not-for-profit corporation ("MCA"; this corporation has no parent companies, subsidiaries, or affiliates that have issued shares to the public).

Respondents

The Parish of Jefferson (of the State of Louisiana); Timothy Coulon, in his official capacity as President of Jefferson Parish; Aaron Broussard, in his official capacity as Chairman of the Jefferson Parish Council; and T. J. "Butch" Ward, Lloyd F. Giardina, Donald Jones, Edmond Muniz, John Lavarine, and Nick Giambelluca, all in their official capacities as members of the Jefferson Parish Council.

Intervenors

The United States of America through the Department of Justice ("DOJ"); the Council for the City of Kenner, State of Louisiana, and Terry McCarthy, Betty Bonura, Marc Johnson, Jeanie Black, John Lavarine, III, Michelle Branigan, and Phil Capitano in their respective capacities as members of the Kenner City Council.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

OPINIONS BELOW xi

JURISDICTION xi

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED xi

STATEMENT OF THE CASE 1

ARGUMENT FOR GRANTING THE WRIT 4

ARGUMENT 1

The Fifth Circuit's affirmation of the trial court's holding that the Parish of Jefferson was properly forced to draw the post-1990 Census District 3 to meet an enhanced racial benchmark demanded by the DOJ is in direct conflict with this Court's earlier decisions. 6

ARGUMENT 2

The lower courts were in clear error in holding that District 3 was not drawn with racial considerations as the Parish of Jefferson's predominant motivation in the placement of its boundaries 11

ARGUMENT 3

District 3 is not a narrowly-tailored remedy to any Section 2 violation by the Parish of Jefferson, and should not survive an objective and proper examination under strict scrutiny 26

CONCLUSION 30

APPENDIX ..... Vols. I and II

Appendix A
Fifth Circuit Opinion, 8/17/99 ..... A-1

Appendix B
Notice of Appeal A-30

Appendix C
District Court Judgment, 8/24/97 ..... A-33

Appendix D
District Court Order and Reasons, 8/24/97 .. A-36

Appendix E
Magistrate's Order, 10/9/96 ..... A-71

Appendix F

Various maps revealing District's 3 racial gerrymander A-76

Map 1 Current Districting Plan showing all precincts drawn into District 3 without racial differentiation. A-76

Map 2 Current Districting Plan showing all BVAP majority precincts contained in Jefferson Parish and all precincts drawn into District 3 ..... A-77

Map 3 March, 1990 "interim" plan, with minor adjustments to the February 1990 first "interim" plan A-78

Map 4 February, 1990 first "interim" plan A-79

Map 5 "4-2-1" format districting plan last used by the Parish of Jefferson to hold regular elections in 1987 ..... A-80

May 6 Precinct map showing Maplewood Subdivision being divided between Districts 1 and 3 on a blatantly racial basis A-81

Map 7 Map showing City of Kenner split between several districts on a blatantly racial basis A-82

Map 8 Map showing City of Westwego split between several districts on a blatantly racial basis A-83

Map 9 Map showing an unpopulated land bridge created by precinct split solely to add BVAP to the current District 3 ..... A-84

Map 10 A copy of the map actually sold retail to the public by Parish of Jefferson with BVAP of District 3 prominently displayed, but with only the total population of the other districts indicated A-85

Appendix G
Parish of Jefferson's 8/22/91 letter submissions to the DOJ of the current plan, with admissions and explanation of the current racial gerrymander. A-86

Appendix H
Parish of Jefferson's attorney M. Nan Alessandra's letter of 8/15/91 to the DOJ explaining the Parish's current racial gerrymander being created to meet the DOJ's demand for an enhanced BVAP majority within District 3 ..... A-90

Appendix I
David Gelfand's letter of 6/19/91 to the DOJ revealing collusion between the DOJ and the EJC plaintiffs to force the Parish to adopt an enhanced BVAP majority within the post-1990 Census adjusted District 3 ..... A-100

Appendix J
David Gelfand's letter of 5/10/91 to M. Nan Alessandra accepting the current racial gerrymander as a settlement to the EJC suit. A-101

Appendix K
Rule 11 hearing transcript of 6/24/91 containing the sworn testimony of Parish of Jefferson's attorney M. Nan Alessandra concerning DOJ's demands for an enhanced BVAP majority and her fears of a delay in the regular 1991 elections unless the Parish capitulated to the DOJ's demands A-117

Appendix L
Sworn Affidavit of M. Nan Alessandra filed in the EJC trial court record on 6/25/91 to support her testimony in the EJC trial court's Rule 11 hearing of 6/24/91 ..... A-120

TABLE OF AUTHORITIES

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 5, 10, 19, 25

Beer v. United States,
425 U.S. 130 (1976) 5, 10

Bush v. Vera,
517 U.S. 952 (1996) 5, 21, 24

Clark v. Calhoun County, Miss.,
88 F. 3d 1393 (5th Cir. 1996) 6, 27, 28

DeWitt v. Wilson,
856 F. Supp. 1409 (E.D. Ca. 1994) ..... .25

Diaz v. Silver,
978 F. Supp. 96 (E.D. N.Y. 1997, affirmed without opinion, Silver v. Diaz, 522 U.S. 801, (1997) .. 16

East Jefferson Coalition v. The Parish of Jefferson,
691 F. Supp. 991 (E.D. La. 1989) 1

East Jefferson Coalition v. The Parish of Jefferson,
703 F. Supp. 28 (E.D. La. 1989) 1

East Jefferson Coalition v. The Parish of Jefferson,
706 F. Supp. 470 (E.D. La. 1989) 1

East Jefferson Coalition for Leadership and Development v. The Parish of Jefferson
926 F. 2d. 487 (5th Cir. 1991) 1, 2

Hays v. State of Louisiana,
936 F. Supp. 360 (W.D. La. 1996) 30

Holder v. Hall,
512 U.S. 874 (1994) 5, 10

Johnson v. Mortham,
926 F. Supp. 1460 (N.D., Fla. 1996) 28

Karcher v. Daggett
462 U.S. 725 (1983) 21

Miller v. Johnson,
515 U.S. 900 (1995) . . . . . 4, passim

Regents of University of California v. Bakke,
438 U.S. 265 (1978) 5

Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 5, 30

Shaw v. Reno,
509 U.S. 630 (1993) 5

Thornburg v. Gingles,
478 U.S. 30 (1986) 5, 8

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 5

Young v. Fordice,
520 U.S. 273 (1997) 6, 10

Statues

14th Amendment, §1, United States Constitution 7

42 U.S.C. §1973 (§§ 2 and 5, Voting Rights Act of 1965, §§ 2, 5 xi

42 U.S.C. §§1973(a), 1973c xi

42 U.S.C. §§1983 xi

OPINIONS BELOW

The opinion of the United States of Appeals for the Fifth Circuit in this matter is reported at 185 F.3d. 477 (5th Cir. 1999). A copy of the Opinion appears in the Appendix, at p. A-1. The Opinion of the District Court for the Eastern District of Louisiana is published at 966 F. Supp. 1435 (1997) and appears in the Appendix at A-36.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on August 17, 1999. This Petition for Writ of Certiorari is filed within an extension that expires on January 18, 2000. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 to the U.S. Constitution
The Equal Protection Clause

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1973 (§§ 2 and 5, Voting Rights Act of 1965, §§ 2, 5; 42 U.S.C. §§ 1973) (a), 1973c; 42 U.S.C. § 1983

STATEMENT OF THE CASE

Petitioners are the Maplewood Civic Association, Inc. ("MCA") and seven of its members who reside within Jefferson Parish (County) Council District 3. They allege that the Parish Council's election districting scheme is the product of an intentional and unconstitutional racial classification and racial gerrymander which they seek to have remedied by a new redistricting made on a basis not predominantly motivated by racial considerations. The MCA represents a relatively small and racially integrated residential subdivision which was divided between two council districts by the current election districting scheme on an obvious racial basis, with the more integrated portion of the subdivision placed within the predominately black District 3 and the largely white populated center portion of the subdivision awkwardly removed from District 3 and placed within predominately white District 1. They also allege that other residential subdivisions, towns, cities, and established voter precincts were split in a blatantly racial manner into the separate council districts in order to enhance the black majority contained within District 3.

The current districting format for the Jefferson Parish Council includes six single-member districts approximately equal in population and one at-large member elected parish-wide (the "6-1" format) and was adopted after African-American voters (the "EJC plaintiffs") sued successfully[1] to

---

[1] See East Jefferson Coalition v. The Parish of Jefferson, 691 F. Supp. 991, (E.D. La. 1988); ("EJC"); see also the reported interim decisions, *East Jefferson Coalition v. Parish of Jefferson,* 703 F. Supp. 28 (E.D. La. 1989) ("EJC II"), *East Jefferson Coalition v. Parish of Jefferson,* 706 F. Supp. 470 (E.D. La. 1989)

have an earlier districting scheme (the "4-2-1" format)[2] declared to be in violation of Section 2 of the Voting Rights Act ("VRA"), as the larger districts contained in that format were deemed to have diluted the minority vote in the Parish.

The EJC plaintiffs at their trial showed, and the trial court agreed, that they were able to form a majority of 50.12% black voting age population ("BVAP") in one single member district under the "6-1" format when utilizing the 1980 Census figures. The Parish Council, led by longtime incumbent and Democrat James Lawson, then adopted an interim "6-1" plan which included a District 3 with a 50.12% BVAP majority. Upon release of the 1990 Census there was revealed a substantial under-population within that interim District 3. That now under-populated district's boundaries included (as per the 1990 Census' population figures) a BVAP majority of 52.3%, and that district was then required to add substantial new population in order to meet one-person/one-vote requirements.

Maintaining a BVAP majority after adding the new population to the district then proved problematic as, in order to confect the interim District 3 utilizing the 1980 Census figures, the EJC plaintiffs and the Parish had included virtually all of the black population which reasonably could be drawn to be included within the "interim" District 3, in

---

("EJC III") and *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 926 F.2D. 487 (5th Cir. 1991) ("EJC IV"). The Trial Court in the instant case took judicial notice of the entire record of the EJC case.

[2] The smallest districts in this format included four single-member districts, each made up of approximately one-fourth of the Parish's population.

order to achieve the original 50.12% BVAP majority. The Parish, when required to adjust the population of the districts to the new census, made every attempt to maintain a BVAP majority in the adjusted District 3, but simply could not do so in a geographically sensible manner. The EJC plaintiffs and the United States, through the Department of Justice ("DOJ"), after release of the 1990 Census, nonetheless then increased their demands from the earlier goal and agreement of a simple BVAP majority and demanded that the Parish draw the adjusted District 3 to have a minimum of 52.3% BVAP, lest they then instigate additional litigation, a likely denial of pre-clearance by the DOJ, and a delay in the regular 1991 elections. This requirement mandated that the Parish connect to District 3 the settlements of black population in the Harvey area, an area geographically separated from all of the earlier plans for a black majority district.

At this point, the Parish Council, again led by James Lawson, then chose to ultimately adopt a "6-1" plan which included the Harvey area and an enhanced 57.1% BVAP majority in order to gain the support of the EJC plaintiffs in adopting that plan as a settlement to the pending litigation. In doing so, the Parish drew the current District 3 which, for the first time in the Parish's history, split residential subdivisions, cities, towns, established voting districts and precincts on an exclusively racial basis, creating the 57.1% BVAP majority in that district. This lawsuit challenges that districting plan.[3]

---

[3] The (Theriot) writ petitioners here will be referred to as the "plaintiffs," the Parish of Jefferson and the elected officials also named here as defendants will be referred to by their respective names, or as the "defendants," the "Parish," or "Jefferson Parish." The United States, through the Department of Justice, will

Shortly after the Supreme Court decided Miller v. Johnson, 515 U.S. 900 (1995), the petitioners filed suit to overturn, as an impermissible racial gerrymander, the current districting plan of the Jefferson Parish Council. After discovery and extensive motion practice, the case was bench-tried on March 10-12, 1997, with the Trial Court ruling in the defendants' favor to maintain the current districting scheme. After judgment was issued and a new trial and other relief were denied, an appeal timely followed. After extensive briefing and oral argument, the Court of Appeals for the Fifth Circuit, on August 17, 1999, affirmed the Trial Court's decision.

ARGUMENT FOR GRANTING WRIT

This is the most important voting rights matter that this Court will have an opportunity to decide this year, and perhaps for many years to come. The published opinion of the Fifth Circuit, if allowed by this Court to stand, will require political subdivisions to engage in impermissible racial gerrymandering upon the release of the 2000 Census – in direct conflict with this Court's recent decisions and earlier decisions by the Fifth Circuit. The Fifth Circuit's holding here mandates that a heightened BVAP in an election district, shown by a new census and resulting from population loss, must be used as the "benchmark" to determine retrogression under Section 5 of the VRA. Using such benchmarks after the release of a new census will cause chaos in the reapportionment of numerous subdivisions if this ruling is allowed to be the law of the Fifth Circuit. Political subdivisions within states covered by the Voting Rights Act,

---

hereinafter be referred to as the "DOJ."

at the prodding of prospective plaintiffs and a very activist and sympathetic DOJ, will then be forced to comply with one-person/one-vote requirements while maintaining unreasonably-demanded racial benchmarks. Such racial classifications have been struck down by this court in the line of cases following Shaw v. Reno, 509 U.S. 630 (1993).

Further, the published opinion of the Fifth Circuit here is in direct conflict with this Court's earlier holdings with regard to the proof of race predominating in the drawing of election districts. It is imperative that the Fifth Circuit's decision here on that issue be reviewed and corrected. Additionally, as the district challenged here was not a narrowly-tailored remedy to past discrimination – but an excessive racial classification used to separate voters – the legislative action creating the district should not be allowed to escape or withstand a proper examination under strict scrutiny.

With redistricting under the year 2000 Census fast approaching, it is urgent, and of national importance, that this Court provide guidance with respect to the issues presented by this case. In affirming and constructively requiring the racial segregation of voters into separate election districts in the manner used here, the published decision of the Court of Appeals conflicts in principle with, and undermines the precedential value of, the Supreme Court cases of Abrams v. Johnson, 521 U.S.74 (1997); Beer v. United States, 425 U.S. 130 (1976); Bush v. Vera, 517 U.S. 952 (1996); Holder v. Hall, 512 U.S. 874 (1994); Miller v. Johnson, 515 U.S. 900 (1995); Regents of University of California v. Bakke, 438 U.S. 265 (1978); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Shaw v. Reno, 113 S.Ct. 2816 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986); Wygant v. Jackson Board of

Education, 476 U.S. 276 (1986); Young v. Fordice, 920 U.S. 273 (1997); and the Fifth Circuit's decision in Clark v. Calhoun County, Miss., 88 F. 3d 1392 (5th Cir. 1996).

ARGUMENT 1

The Fifth Circuit's affirmation of the trial court's holding that the Parish of Jefferson was properly forced to draw the post-1990 Census District 3 to meet an enhanced racial benchmark demanded by the DOJ is in direct conflict with this Court's earlier decisions.

The imposition upon political subdivisions covered by the Voting Rights Act, that they avoid Section 5 retrogression violations by being forced to maintain the racial population percentages found under a new census in majority/minority election districts when that census also shows the districts are under-populated, will lead to chaos and wholesale racial gerrymandering after release of the year 2000 Census. The lower courts in this case were both in clear error in holding that a 52.3% BVAP majority population was a legal requirement to be met by Jefferson Parish in order to avoid Section 5 retrogression in the post-1990-Census-adjusted District 3. The requirement that the Parish draw a district which met the enhanced 52.3% BVAP "benchmark" demanded by the DOJ and the EJC plaintiffs, while on its face an innocuous and seemingly reasonable request, was in fact unreasonable, and required an unconstitutional racial gerrymander.

The EJC plaintiffs and the DOJ insisted upon a 52.3% BVAP benchmark for any post-1990 Census District 3 despite

the fact that elections were never held from the "interim" District 3, and that the interim District 3 was surrounded by a large band of predominantly white precincts which would have to be split, altered, and otherwise traversed in order to connect any new black majority areas (here, the Harvey area) to the adjusted District 3. The post-1990 Census population of the Parish showed that, in order to add new black population to the interim District 3, traditional districting principles would have to be violated; precincts, towns, cities, residential subdivisions would have to be split along racial lines; and unpopulated land bridges would have to be created in order to remove white population from, and to include far-flung areas of black population within, District 3. Plaintiffs assert that these legislative actions violate the Equal Protection Clause of the 14th Amendment as they are unconstitutional racial classifications.

Here, this Court should examine two questions: First, must a political subdivision be absolutely required to maintain a BVAP majority in a district after a new census, when those new census figures also reveal a black population so dispersed as to require a blatant racial gerrymander in order to maintain the BVAP majority after the required adding of new population to the adjusted district? Second, must a political subdivision, upon the release of a new census showing an under-populated majority/minority district, use as the Section 5 retrogression "benchmark" the new minority VAP found within the older boundaries of the pre-adjusted district as counted by the new census, when to meet that certain percentage would force a blatant racial gerrymander in order to add new minority population.

In response to the first question, this Court has

addressed in Thornburg v. Gingles, *supra* ("Gingles"), the standards used to require political subdivisions to draw majority/minority election districts to avoid Section 2 (minority vote dilution) violations. Those standards include the necessity that a minority population be geographically compact in order to form a sensibly drawn majority/minority election district. Along that same line of reasoning, it would be logical that in order to require a jurisdiction to retain an absolute majority/minority VAP district when reapportioning its districts, the jurisdiction's minority population under that new census must be sufficiently compact to permit the drawing of a geographically compact election district.

Here, the Gingles requirement of compactness was met by the EJC plaintiffs to form a bare BVAP majority (50.12%) under the 1980 Census, but no court has ever re-examined for that compactness after the release of the 1990 Census–and such re-examination should have been required here under Gingles prior to the DOJ demanding that the Parish maintain an absolute BVAP majority (much less their enhanced demands for a greater BVAP percentage) in District 3 after the release of the 1990 Census. Quite the contrary, the under-populated (post-1990 Census) interim District 3 was surrounded by white population and could not, absent a blatant racial gerrymander, add the requisite black population needed to maintain a BVAP majority, much less the DOJ's increased demand of 52.31%. Near the end of the EJC litigation, the EJC Trial Court was so disgusted by the Parish's capitulation to the demands of the EJC plaintiffs and the DOJ in its adoption of the gerrymander created by the current plan that it rejected the plan, and appointed a Special Master to redraw the "interim" election districts as adjusted to the 1990 Census. The Special Master found that a near

majority BVAP plurality District 3 (which included a healthy black voter registration majority) was the only reasonable adjustment of the districts under the new census. This is the only objective finding which could have been reached when applying Gingles to the EJC plaintiffs' claims. Nonetheless, the Fifth Circuit at the end of the EJC litigation ignored the Gingles requirements and instead summarily ordered the implementation of a BVAP majority district after adjustment to the 1990 Census, and further, specifically ordered the implementation of the current gerrymander with its non-compact BVAP majority.

As to the second question, a requirement that a political subdivision in all cases maintain as a Section 5 retrogression "benchmark" the exact minority VAP percentage found within a now under-populated majority/minority district (as shown by a new census) is unreasonable; as it actually requires, in certain cases, racial gerrymandering otherwise prohibited by this Court. Petitioners readily concede that there may be jurisdictions with majority/minority districts that can easily be drawn to retain certain minority VAP percentages, but that in many subdivisions, such as the Parish of Jefferson, the requirement that they be forced to maintain particular racial percentages in remedial districts may be difficult if not impossible to meet, as was the case here upon the release of the 1990 Census.

In the instant case, Jefferson Parish was warned by the DOJ that pre-clearance of its election district plans would be denied and that the regularly-scheduled 1991 elections would be delayed if the Parish resisted drawing the post-1990

Census District 3 with a minimum 52.3% BVAP majority.[4] It is important to note that the Parish's attorneys at the time openly questioned the legality of DOJ's new and enhanced race-based requirement, but nonetheless advised the Parish to capitulate to these demands in order to avoid a delay in the elections. The result is the current 110-sided District 3 that is the least compact, most geographically far-flung, most disruptive and race-conscious district ever adopted, or even proposed, in the history of Jefferson Parish.[5]

This Court in Beer v. United States, 425 U.S. 130, 141 (1976) established a "non-retrogression" principle: that any redistricting plan is sustainable under Section 5 if it enhances to any degree the position of racial minorities with respect to the exercise of their voting rights. In deciding upon proper benchmarks to be used in avoiding Section 5 retrogression, this Court has ruled that it is the districting plan actually in effect – the existing voting status – last used by the jurisdiction which is the proper benchmark. Abrams v. Johnson, 521 U.S. at 97. See also Holder v. Hall, 512 U.S. 874, 883-884 (1994) and Young v. Fordice, 520 U.S. 273 (1997).

It is undisputed that all of the previous plans used by Jefferson Parish to elect council members included only four

---

[4] Appendix K, p. A-108, 109, 110, 116; Appendix L, p. A-122, 123, 125, 126; Appendix H, p. A-96 and 97. Further, it is also clear from the record that the EJC plaintiffs and their legal counsel acted in collusion with the DOJ at that point in the litigation to force the Parish to adopt the enhanced black-majority district. See Appendix I, p. A-100.

[5] Appendix F, various maps.

single-member districts, none of which had a BVAP population exceeding 24%. The first "interim" six-single district plan adopted by the Parish in 1989 included a 46% BVAP majority district. Soon after, at the EJC plaintiffs' and the DOJ's prodding, the Parish altered that plan to adopt the "interim" District 3 with the 50.12% BVAP majority.[6] Again, none of the interim six-single member district plans were ever used to hold elections prior to the 1991 election, and the last district plan actually used to elect members of the Parish council had four single-member districts (the "4-2-1"districting format) with the highest BVAP in any one district at 24%. It is the petitioners' position here, as it was at trial and on appeal, that the creation in 1991 of any black-majority district, or even a single-member district with a strong BVAP plurality, actually enhanced the position of racial minorities with respect to voting rights in Jefferson Parish and could not be considered to be retrogressive as compared to the districting schemes previously used to actually elect council members. In that light, the lower courts' holdings that the Parish of Jefferson was legally bound to create a 52.3% BVAP post-1990 Census District 3 – in order to avoid a Section 5 violation – is clearly in error as a matter of law.

ARGUMENT 2

The lower courts were in clear error in holding that District 3 was not drawn with racial considerations as the Parish of Jefferson's predominant motivation in the placement of its boundaries.

---

6 Appendix F, Maps 3, 4, p. A-78, 79.

The Theriot plaintiffs met their burden of proof [7] in providing clear and convincing documentary evidence and testimony which proves that the current District 3's boundaries were drawn with race as the predominant motivation, in order to meet or exceed the 52.3% BVAP requirement insisted upon by the DOJ to gain Section 5 pre-clearance, to settle the pending EJC litigation, and to avoid a delay in the scheduled 1991 elections.

The Theriot plaintiffs at trial proved that when the Parish drew the current districts, including the current District 3, it disregarded and subordinated traditional race-neutral districting principles – such as compactness, and respect for political subdivisions including established municipalities, towns, and even individual voter precincts. The traditional and long-respected north/south character of the Parish's West Bank councilmanic districts was completely abandoned only after the Parish Council members,[8] led by James Lawson, made the conscious decision to draw an enhanced BVAP majority of 55%[9] or more within the current District 3.

---

[7] Miller v. Johnson, 515 U.S. at 916.

[8] See Appendix F, various maps, as well as the trial testimony of Ward, p. 76, 77, 79; Gandolfi, p. 106, 109; DeViney, p. 38; Hughes, p. 100-101; Hooper, p. 26; and Lawson, p. 108, 109, 113, 132. Plaintiffs here will refer to witnesses' testimony by giving the last name of the witness, followed by the page number of the portion of the trial record where the witnesses testimony is actually referenced. The plaintiffs are unable, at this time, to reference individual witnesses' testimony by the record or Bates numbers of the pages where this testimony appears in the trial record.

[9] While the post-1990 Census BVAP found within the boundaries of the under-populated interim District 3 was 52.3%,

It is important to note that despite the lower courts' findings that the drastic evolution of District 3 was the result of Lawson's attempt to improve his political fortunes, he was perfectly willing to use his council majority to draw earlier districting plans that were all very similar to the Special Master's Plan, and that Lawson and his council majority was also perfectly willing to actually allow the Special Master's Plan to be used to hold the regular 1991 elections. The Parish of Jefferson never objected at any time to the implementation of the Special Master's Plan, as it was the DOJ and the EJC plaintiffs who objected to the intrusion by the EJC trial court (via appointment of the Special Master) into the "legislative bailiwick" – thus blocking the implementation of a sensible BVAP plurality plan and prompting the Fifth Circuit to summarily order implementation of the current plan.

It is abundantly clear from Lawson's own testimony, and an objective review of the record that Lawson – a Democrat with a history of strong support in the Parish's black community – actually subordinated his own political interests to the creation of an enhanced BVAP majority in the current District 3 in order to avoid a feared delay of the scheduled 1991 elections. He was willing to yield to the DOJ's racial demands, even though the result would be his

---

the Parish's Attorney, M. Nan Alessandra understood the DOJ's post-1990 Census demand to be a 53% BVAP majority, as memorialized by her hearing testimony (Appendix K, p. A-111), her supporting affidavit (Appendix L, p. A-122, 123, 125) and her August 15, 1991 letter to the DOJ (Appendix H, p. A-90). Lawson then sought to "meet or beat" the EJC plaintiffs' 55% BVAP proposal, which he did, in order to gain their support of his plan as settlement of their litigation.

seeking re-election against a fellow incumbent, Republican Lloyd Giardina, in a new district stripped of black voters. This was politically detrimental; while Lawson barely won reelection in 1991, Giardina came back to defeat him in that same district in 1995.

As was true in Miller v. Johnson, when the shape of District 3 is viewed "in conjunction with its racial and population densities," the fact that race was the predominant factor in the drawing of this district becomes overwhelmingly clear. Every time the district splits a broadly-peopled precinct, town, municipality, or residential subdivision, it gathers in a disproportionate number of black voters or excludes a disproportionate number of white voters. Every time that the district splits a precinct to create an unpopulated or under-populated land bridge, it does the same. The attached maps of District 3[10] shows that the district starts on the "East Bank" (which is north of the "West Bank") then jumps across the Mississippi River to two majority-black neighborhoods, then goes south along the western border, through unpopulated marshes, to the southern end of the Parish, and then travels back up northward and eastward to collect other additional and dispersed pockets of black population, blatantly splitting municipalities, established voting precincts and subdivisions to enhance its black population majority.[11] In fact, the district so deviates from the compactness of previous proposals for a black-majority district, that Lawson worried that his plan was not compact enough to gain the EJC

---

[10] Appendix F, maps 1, 2, A-76.

[11] Appendix F, map 2, A-77. See also Plaintiffs' Exhibits 1, 3, 5, 7, and 8 contained in the trial record.

trial court's approval, and because of those concerns he deliberately and successfully sought to raise its BVAP in excess of 55% in order to gain the EJC plaintiffs' support of his plan as a settlement.[12]

The lower courts also clearly erred in holding that geographic realities and traditional districting principles were not subordinated to race in the drawing of District 3 and ignored the testimony and evidence presented at trial which clearly proved that particular precincts were split solely to add black populations to District 3, to create land bridges which added black population to District 3, or to minimize the white population added to District 3. In the Parish's August 15 and 22, 1991 submissions of the current districting plan to the DOJ for pre-clearance, the Parish wrote to the DOJ an explanation of particular precinct splits and squarely admitted that these actions were taken to "enhance" the BVAP of District 3.[13] This admission is corroborated by other testimony from Alan Gandolfi, by fellow Parish Council staffers Kenny Hughes and Gary Duker, and by Dr. John Wildgen, the cartographer who actually drew the districts at the direction of the Parish Council research staff and the sworn affidavit of the Parish's attorney, M. Nan Alessandra.[14]

Where the Parish admitted splitting precincts to

---

[12] Please see Gandolfi, p. 85, 86, 90, 92, 93, 94, 114, 118; Duker, p. 15, 30, 31, 41, 43; Hughes, p. 94-95, 126-127; Lawson, p. 71-73, 88-89, 96; and DeViney, p. 21.

[13] Appendix G, p. A-86; Appendix H, p. A-90.

[14] Wildgen, p. 143, 145-148, 158, 170-171; Duker, p. 57-59; Hughes, Gandolfi (cites omitted here) and Alessandra, Appendix L, p. A-123, 124.

enhance the BVAP majority of District 3 in its submission of the current plan to the DOJ for pre-clearance, it bound the Parish "...as an adoptive admission to all of the statements...contained therein." Diaz v. Silver, 978 F. Supp. 96, 120 (E.D. N.Y. 1997) affirmed without opinion, Silver v. Diaz, ___ v. ___, 118 S.Ct. 36 (1997). Further, as in Diaz the absence of any statement of Lawson's (or the Parish's) alleged political motivation in the VRA pre-clearance request to the DOJ also weighs against their present claims of a "political" rather than racial motivation, see Diaz, 978 F. Supp. at 120.*

The Fifth Circuit's holding entirely discounts the strong hand of the DOJ in forcing the Parish to alter the more sensible geography of the earlier District 3 into the egregious racial gerrymander that is its current form.[15] As this Court has shown in Miller,[16] by demanding a maximization of majority-minority districts, the Justice Department impermissible encouraged – in effect mandated – racial gerrymandering. The Parish's capitulation here only reinforces the conclusion that it knowingly allowed race to become the predominant factor in the drawing of the districts.

Where the lower courts held that "politics," "one-person/one-vote," or "contiguity" drove the design of the current districts, particularly with regard to the "V" shape of District 3, it again ignores the overwhelming testimony and evidence, and makes these findings in error. The trial testimony of James Lawson, his anticipated 1991 opponent,

---

[15] Appendix A, p. ___.

[16] Miller v. Johnson, 515 U.S. at 900-918.

fellow incumbent Lloyd Giardina, as well as Parish Council staff members, show without dispute that Lawson would have politically benefitted in his re-election effort had he chosen to include within his District 2 any of the majority black precincts which were ultimately placed into the adjacent District 3 in order to enhance that district's black majority.[17] This action by Lawson flies in the face of the trial court's finding that Lawson created the boundaries of the districts solely to benefit himself politically.[18] Various witnesses, including Parish Council staffers, squarely testified that the "V" shape of the district was chosen to include the heavily black population settlements of the Harvey area needed to enhance the BVAP majority within District 3. Additionally, the fact that the six incumbents who all anticipated running for reelection in 1991 agreed to the drawing of a black-majority district from which none would seek election, in full knowledge that at least one would not have a district and that two of them would be required to face each other as opponents for reelection,[19] plainly reveals that incumbency protection was absolutely compromised for racial considerations. Lawson's actions to enhance the BVAP of District 3 over and above any Section 2 remedy in order to effect the settlement of the EJC litigation – a racial manipulation of boundaries made to Lawson's admitted political detriment – further clearly proves that the traditional

---

[17] Lawson, p. 67, 90, 91, 92, 98, Giardina, p. 13, 14, Ward, 41, Hughes, p. 126.

[18] See Appendix D, p.___, "Lawson set out to insure that his strongest constituencies would be placed in District 2."

[19] Ward, p. 32, 33; Duker, p. 24; Evans, p. 36, 37; Hooper, p. 17, 59-60, Appendix L, p. A-123, 124.

and logically universal districting principle of incumbency protection was subordinated to race.

The Parish of Jefferson at the time of the drawing of the current plan had a total of 31 BVAP majority precincts.[20] The City of Kenner has 34 total precincts of which only nine, including all eight of Kenner's BVAP majority precincts, are drawn into the current District 3.[21] Only one of Kenner's 26 white majority precincts are drawn into the current District 3, with that precinct being Precinct 13K(B), which does contain a white majority VAP, but was admittedly divided by the Parish to place the more heavily black portion of the previously undivided Precinct 13K into District 3 in order to meet the one-person/one-vote rule while adding a minimum of white population.[22] The City of Westwego has a total of eight precincts, of which only one, Precinct 2W, has a BVAP majority and is the only Westwego precinct drawn to be included within the District 3, as all of Westwego's white majority precincts are placed into other districts.[23] The township of Lafitte contains an overwhelmingly white majority population, and prior to the adoption of the current plan had only one voting precinct. In the current districting plan, the town was divided to create an additional precinct, the unpopulated Precinct 1L, which was admittedly used by the Parish to create a land bridge which would connect the Harvey area's black population to District 3.[24] The town's

---

20 Appendix F, Map 2, A-77. See also Plaintiffs' Exhibits 1, 3, 5, and 7 admitted into evidence at trial.

21 Appendix F, Map 7, p. A-82.

22 Gandolfi, p. 76-77, 144-145, 151.

23 Appendix F, Map 8, p. A-83.

24 Appendix F, Map 9, p. A-84, Appendix I, p. A-123, 124.

remaining heavily white population was placed into the newly created Precinct 2, which was then placed into white majority District 2. The only significant settlements of the Parish's black population not included within the current boundaries of District 3 are the areas of Gretna/McDonoughville (Precincts 1G, 4G, 6G and 7G), and Shrewsbury (Precincts 107, 131 and 132).[25] There is no practical way that any of these precincts could have been included within any majority-black district (utilizing a "6-1" districting format) also drawn to include the black-majority areas located in Kenner and the Avondale area.[26] The lower courts ruled in clear error that the failure to include those areas within District 3 proves that District 3 was not drawn to maximize its black population.

The splitting of the City of Kenner was also done for purely racial reasons.[27] The incumbent Councilman Hooper reluctantly gave up Kenner's black precincts solely in order to draw the current BVAP majority District 3.[28] Though the defendants claimed at trial that the City of Kenner had a desire to be split in order to increase its political influence, the evidence and testimony in the trial court record makes it very questionable that the Parish ever considered this at the time of the drawing of the current districts In addressing a city government's (alleged) preference to be split among various districts, the Supreme Court in Abrams v. Johnson declared that a city's "alleged urge to be segregated for congressional districting purposes, however, cannot vitiate the Equal

---

[25] Appendix F, Map 2, p. A-77.

[26] Appendix F, Map 2, p. A-77, Ward, p. 37, Giardina, p. 29-30, Powell, p. 99.

[27] Hooper, p. 59, 60; Gandolfi, p. 76-77, 144-145, 151.

[28] Hooper, p. 39, 59-60.

Protection Rights of...(a) district's voters." 521 U.S. at 89.

The lower courts also ignored the evidence and the admissions by the Parish that the Maplewood Subdivision was split along racial lines only after Lawson committed to a District 3 with an excess of a 55% BVAP majority; a split of the residential subdivision which clearly enhanced the BVAP majority of District 3.[29] Instead, the lower courts chose to honor the incredible testimony of Lawson, who claimed that the subdivision was divided in a coincidentally disproportionate racial gerrymander in order to prevent one elderly lady from raising "political Cain" unless she was placed into Butch Ward's District 1.[30]

The lower courts further erred in ruling that unpopulated land bridges were not created to enhance the black population majority in District 3, but were motivated by the Parish's meeting the "one-person/one-vote" requirement. These land bridges were admitted by the defendant Parish's staffers Gandolfi and Hughes to have been specifically created to allow District 3 to go around the bottom of the Parish to pick up and include the black population areas east of the Harvey Canal, while, at the same time, picking up the minimum additional white population. Dr. John Wildgen, the cartographer charged with actually drawing the boundaries of the district, testified that in creating its boundaries, he concentrated virtually exclusively upon on racial

---

[29] See Appendix G, p. A-86 and Appendix H, p. A-90, and Appendix L, p. A-123, 124 where the Parish admits to have split the Maplewood precinct 213 as well as other precincts in order to enhance the BVAP majority of the current District 3.

[30] See Appendix D, p.___.

demographics[31] and considered essentially no other factors except contiguity and the ubiquitous constitutional "one-person/one-vote" requirement.[32] The software he used, like the REDAPPL software in Bush v. Vera, *supra*, contained only racial data on a block-by-block level; other data was at precinct level.

James Lawson plainly testified that the current District 3 was drawn with a 57.1% BVAP majority to "meet or beat" the 55% BVAP percentage of black voters contained in the EJC plaintiffs' proposed plan, in order for Lawson to gain the support of the EJC plaintiffs in a settlement of that litigation, and also to avoid a delay of the Fall 1991 elections.[33] It is not disputed that Lawson had already gained the support of a majority of the Parish Council to support his plan to draw the six single-member councilmanic districts.[34] It is also not disputed that the three East Bank councilmanic districts boundaries, as well as the approximate boundaries of Ward's West Bank District 1, were agreed upon by the incumbents serving those districts, and that the vast majority of attention and boundary disputes involved Districts 2 and 3, both centered on the West Bank.[35]

---

[31] See Wildgen, p. 154-156.

[32] "Absolute population equality [is] the paramount objective." Karcher v. Daggett 462 U.S. 725, 732 (1983).

[33] Lawson, p. 71-73, 88-89, 94, 95, 97, 98, 124, 125.

[34] Ward, p, 30, Gandolfi, p. 95, 114, 132, DeViney, p. 26, Hughes, p. 80, 84, Lawson, p. 68, 69, 133, 134, Giardina, p. 20, 40, 44, 45, 53-54, Muniz, p. 20, Hooper, p. 51. See also Appendix D, p. ___ (where the Theriot trial court holding accepts this).

[35] Gandolfi, 128-129, Hughes, p. 76, Muniz, p. 58, Hooper, p. 35, Lawson, p. 68.

Under cross examination, Lawson testified that he used the EJC plaintiffs' 55% BVAP percentage contained in their proposed District 3 as a minimum racial baseline to be included in the plan adopted by the Council.[36] Lawson's testimony was corroborated by that of Parish Council staff members Alan Gandolfi and Kenneth Hughes, who testified that there were "many" conversations with Lawson about the need to "meet or beat" the EJC plaintiffs' proposal of a District 3 which included a BVAP of 55% in order to enlist the EJC plaintiffs' support for a settlement of the pending EJC litigation.[37] Much of Council staffer Gary Duker's testimony, in response to direct questions asked by the trial court, also clearly corroborated the position that the Parish was forced to create a district with an enhanced black majority in order to bring an end to the EJC litigation,[38] and that in order to also achieve pre-clearance from the DOJ, Lawson and the Parish labored with the belief that its districting plan was again required "to be at least equal" to or exceed the 55% BVAP majority of the EJC plaintiffs' plan.

Gandolfi also testified that Lawson was particularly concerned that the EJC trial court would object to the non-compactness of Lawson's District 3 unless the EJC plaintiffs joined Lawson and his council majority in presenting the non-compact District 3 as a joint settlement.[39]

The trial court appeared to fully understand Lawson's racial motives and his ultimate ability to achieve his goal of

---

36 Lawson, p. 72, 88-89.

37 Gandolfi, p. 85, 86, 90, 92-94, Hughes, p. 94-95, 126-127.

38 See Duker, p. 30.

39 Gandolfi, p. 86.

a settlement by drawing a District 3 which had a higher BVAP majority, as evidenced by the Court's comments from the bench.[40] Nonetheless, the trial court ruled and the Fifth Circuit affirmed, both in error, that Lawson's motivations were "political in nature,"[41] and that Lawson's intentionally drawing the district with an enhanced racial majority "was political, not racial,"[42] as it was "Lawson's albeit misguided appreciation of the situation which resulted in this (race-based) jump."[43] But to the contrary, the record clearly shows that Lawson's (and the Parish's) drawing the district with an enhanced black majority was done only to comply with the purely racial reasons of the DOJ and the EJC plaintiffs, and that this "misguided" action met none of the permissible criteria for race-based government action.

The Department of Justice actively reinforced the Parish's belief that it would not preclear any plan without an enhanced black-majority district, and that the DOJ would not accept simply a black-majority district as a remedy.[44] The DOJ insisted upon the Parish drawing a district with an enhanced black majority – despite the absolute difficulty in drawing such a district[45] – and in its communications with the Parish's counsel, M. Nan Alessandra, left the distinct impression that it would refuse pre-clearance of any districting plan that did not include an enhanced black

---

40 See Gandolfi testimony, p. 90, with the exchange between the trial court and witness Gandolfi.

41 See Appendix D, p.___.

42 See Appendix D, p.___.

43 See Appendix D, p.___.

44 Appendix K, p. A-108, 109, 110, 116; Appendix L, p. A-122, 123, 125, 126; and Appendix H, p. A-96, 97.

45 Appendix K. p. A-108, 109; Appendix L, p. A-122.

majority district, resulting in a delay of the regular 1991 elections.

The lower courts were also in clear error in admitting and giving weight to evidence presented by the defense and the DOJ at trial which purported to show that the Parish considered community of interest concerns in joining together the various geographically separate majority black precincts which make up the current District 3. Any purported community of interest data must have been considered by the political subdivision at the time of the creation of the election districts in order for such data to be relevant into an inquiry regarding race-based districting. See Bush v. Vera, *supra*. None of the purported community of interest data, historical data or the economic data presented by the defendants at trial was available to the council members or their staffers at the time the current districts were drawn, as all of this evidence was compiled after the implementation of current districts.[46] This evidence and related trial testimony, because of its *ex post facto* assembly and presentation, should not have been considered as a proper rationalization for the current district boundaries or in determining whether the district was a "narrowly-tailored" remedy to past discrimination. See Bush, 517 U.S. at 966-967.

A review of the objective evidence provided by the current and earlier districting proposals and districting schemes clearly reveal that the current District 3 is by far the least compact councilmanic district either adopted or even proposed in the Parish's recent history.[47] The Supreme Court

---

[46] See Defendants' Exhibits 152, 153, 154, 160, 161 and 167.

[47] See Appendix F, p. A-76, various maps.

has ruled that such districts cannot pass constitutional muster, holding that:

> "As we have noted before § 2 does not require a State to create, on predominantly racial lines a district that is not "reasonably compact." In Johnson v. De Gandy, 512 U.S. 997, 1008 (1994) (other citations omitted). And the § 2 compactness inquiry should take into account "traditional districting principles such as maintaining community of interests and traditional boundaries." Abrams v. Johnson, 521 U.S. 74 (1997) (citations omitted).

Insofar as the lower courts have accepted the Parish's "geographic realities"[48] as a rationalization for the irregular shape of the current District 3, it is absolutely obvious, when viewing the districting plan, that the internal boundaries separating areas of black and white population into separate districts are much more irregular than Parish's geography.[49]

The DeWitt v. Wilson case, 856 F.Supp. 1409 (E.D. Ca. 1994), often cited by the Defendants and the DOJ in their defense of the current District 3, specifically rejects districts drawn in the manner of District 3. DeWitt requires compact majority-minority districts which respect traditional

---

[48] See Appendix D, p. ___.

[49] See Appendix F, p. A-76 various maps. See also Ward, p. 49 (Witness does not deny calling the current District 3 a "racial gerrymander" in a public council meeting), DeViney, p. 19 (This witness referred to the district as a racial gerrymander, and found the current plan to be "offensive."), Hughes, p 89-90, Giardina, p. 56 (Admits to calling the district a "racial gerrymander.").

districting principles, and its holding pointedly rejects "snake-like" land bridges that are very similar in description to the land bridges used in District 3 to connect settlements of black populations located in Kenner, Bridge City, Grand Isle, Marrero, and Harvey, which were admitted by the Parish to have been created by the splitting of established voter precincts solely to enhance the BVAP majority of District 3.[50]

Educated by Bush v. Vera, the defendants and the DOJ attempted to use "politics" to hide the fact that District 3 was gerrymandered for a predominantly racial reason, *i.e.*, to meet the Miller v. Johnson-like demands of the DOJ and of the EJC plaintiffs to maximize the BVAP. The lower court unaccountably "bought" this tactic. But after granting certiorari, this Court can see the clear record evidence that the configuration of District 3 was the result of forbidden racial motivations.

ARGUMENT 3

District 3 is not a narrowly-tailored remedy to any Section 2 violation found in the Parish of Jefferson, and should not survive an objective and proper examination under strict scrutiny.

The Fifth Circuit should have strictly scrutinized the current districting plans; had the current plan been examined under that exacting standard, it is respectfully submitted that

---

[50] Appendix G, p. A-86. See also Gandolfi, p. 76, 77, 78, 79, 81-82, 89, 116, 121, 151-152, 161-162; Hughes, p. 87, 89-90, 103-104; Duker, p. 13, 14; Hooper, p. 26; and Giardina, p. 8, 29.

it could not have passed muster. Strict scrutiny applies to challenged election districts where "race for its own sake, and not other districting principles, was the Legislature's dominant controlling rationale in drawing its district lines." Miller v. Johnson, 515 U.S. at 913, and where "the Legislature subordinated traditional race-neutral districting principles...to racial considerations, 515 U.S. at 916. For strict scrutiny to apply, the plaintiffs must prove that other legitimate districting principles were "subordinated" to race. Miller, 515 U.S. at ___. Race must be ". . .the predominant factor motivating the Legislature's redistricting decision," Id. The Fifth Circuit's gloss is:

> "To be narrowly tailored, the remedial district must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the found wrong. Stated another way, the remedial district must substantially address the violation and not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons" Clark v. Calhoun County, Miss., 88 F.3d 1392 at 1407, 1408 (5th Cir., 1996).

The EJC trial court's Special Master's Plan was in fact an actual "court-drawn" remedy to the EJC plaintiffs' Section 2 claims. No one can argue that the current plan does not substantially deviate from the sensible remedies provided by the earlier "6-1" format districting plans or by the Special Master's Plan. The wholesale deviations and excessive use of race are exactly the types of racial classifications condemned by the Fifth Circuit in its Clark v. Calhoun County. The Parish's legislative action in creating the current

District 3, with its explicitly admitted racial motivations and excesses, is in violation of this Court's relevant holdings as well as the earlier dictates of the Fifth Circuit's own Calhoun County.

The defendant Parish and the DOJ presented very little evidence at trial to prove their assertion that the current District 3 was drawn to meet a compelling state interest. Where they did attempt to defend the excessive racial considerations in the drawing of the district, their primary justification was that the district was drawn to remedy past state-sponsored discrimination in the general sense. However, it is only state-sponsored discrimination in current voting laws and procedures – of which no evidence was presented in this case – that would be relevant to justify current District 3.[51] None of the witnesses presented by any party testified that there presently existed impediments to the Parish's minority citizens' ability to fully participate in the electoral process. Quite to the contrary, longtime council member and defendant Butch Ward testified that there were no lingering effects of discrimination with regard to the current voting laws and procedures.[52] Further, it was established at trial that there has never been a black-majority district created within the Parish of Jefferson – with even the slightest black voter registration majority – that has failed to elect a black candidate to office from its very inception.[53]

---

[51] See Johnson v. Mortham, 926 F.Supp. 1460, at 1493 (N.D. Fla. 1996).

[52] See Ward, p. 22.

[53] See Ward, p. 42, 43, and Giardina, p. 38 and 60. See also p. 60 of Giardina's testimony where the Theriot trial court in discussing the defendants' counsels' objection to a question states in open court that this issue is "not a seriously contested fact." See

The defendants and the DOJ instead presented very generalized evidence and trial testimony as to current alleged discrimination. Much of it was revealed under cross examination to be poorly researched, admittedly biased in favor of keeping the enhanced black-majority district, or simply "interested" defendants' witnesses' recollections of what they claim to remember seeing on television or reading in the newspaper. Eschewing a proper weighing of this testimony, the trial court erroneously held that the defendants had met their burden and had proved that the challenged district would in fact withstand examination under strict scrutiny,[54] presumably on the grounds that "race-neutrality" had "not yet been achieved in Jefferson Parish at this time."[55] The Fifth Circuit did not address whether the district would survive strict scrutiny, stating that such an analysis was unnecessary in light of its holding that racial considerations were not the predominant factor in the drawing of the challenged district.[56]

The defendant Parish failed to meet its burden as required by the relevant Supreme Court holdings, which hold:

---

also Gelfand, p. 183, 204-205 (a 50.18% BVAP majority provided black voters a "reasonable opportunity" to elect candidates of their choice), Irvin, p. 75-77; Engstrom, p. 195 (50.8% BVAP adequate to elect black candidate) and p. 199-200; Powell, p. 135-136 (white cross-over voting for black candidate exceeds black cross-over vote for white candidate where black candidate makes a serious effort to be elected to office).

[54] Appendix D, p. ___, "Even if it (strict scrutiny) were required, this plan is narrowly tailored to meet a compelling state interest."

[55] Appendix D, p. ___.

[56] Appendix A, p. ___.

"Generalized societal remedying of past discrimination can never meet the Supreme Court's requirement of particularized solutions for specifically identifiable vestiges of past discrimination." Hays v. State, 936 F. Supp. 360, 371 (W.D. La. 1996), quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

In light of the above evidence and testimony, this Court should find that the lower courts are in clear error in holding that strict scrutiny shall not apply here, and further, that the trial court was in error in finding District 3 to be a narrowly-tailored remedy which would survive strict scrutiny.

CONCLUSION

Petitioners respectfully urge that this Court grant certiorari so that petitioners on the merits can show that the judgment of the Court of Appeals should be reversed, and that there be a judgment in favor of the plaintiffs, ordering that the Parish of Jefferson councilmanic districts be reapportioned in a manner not predominated by racial considerations.

Respectfully submitted this 17th day of January, 2000.

DOMINIC N. VARRECCHIO
La. Bar Code No.: 19456
1449 Magazine Street
New Orleans, LA 70130
Telephone: (504) 524-8600
Of Counsel

HAYWOOD H. HILLYER III
La. Bar Code No.:6925
Post Office Box 15521
New Orleans, LA 70175-5521
Telephone: (504) 899-0890
Counsel of Record
for Petitioners